

5-2019

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## Old ethics in new wineskins? Examining the ethical difficulties in court online dispute resolution

Posted on **21/05/2019** by **Dr Lola Akin Ojelabi**

**Written by Dorcas Quek Anderson**, Singapore Management University School of Law.

This post is based on a presentation made at the [National Mediation Conference](#), Canberra, April 2019. The presentation has been drawn from two articles, [Ethical Concerns in Court-Connected Online Dispute Resolution](#) (2018) 1-2 *International Journal of Online Dispute Resolution* 20, and [The Convergence of ADR and ODR within the Courts: The Impact on Access to Justice](#) (2019) 38(1) *Civil Justice Quarterly* 126.

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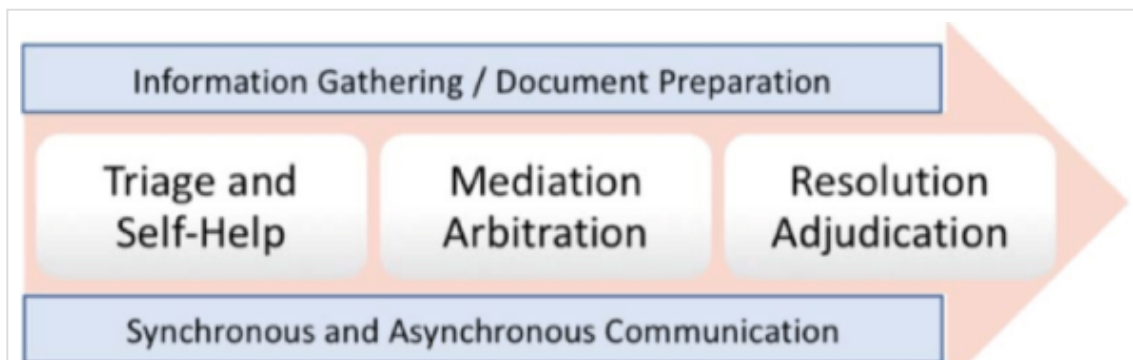
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### The proliferation of court ODR systems

Online dispute resolution (ODR) systems have been increasingly embraced by the courts in many countries as the new way to enhance access to justice. Notable examples include the future Online Solutions Court in England and Wales, the Civil Resolution Tribunal in British Columbia, Utah's ODR system for small claims, and the internet courts in China.

This diagram from the [US Joint Technology Committee's report on ODR for Courts](#) (p. 3) helpfully illustrates how a full-fledged court ODR system typically brings the use sequentially through the steps of triage or problem diagnosis, negotiation, facilitation and online hearings:



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focusing on early participation by parties. The first phase provides initial problem-diagnosis and self-help through the online tool Solution Explorer. This software uses guided pathways to help the user learn more about the dispute, and then diagnoses the problem according to relevant legal rights, and provides tools such as letter templates that can deal with the problem. If the dispute is not resolved at this stage, the user can formally commence a claim through an online intake process that will give notice of the claim to the opposing party. The claimant is then brought to the second phase in which the parties are able to negotiate directly using the online system. The third phase of facilitation introduces the human facilitator to the process. The facilitator draws on a wide range of ADR processes, including mediation and non-binding neutral evaluation, to assist the parties to reach an agreement. In the event that the parties cannot agree, the facilitator takes on a case management role and helps the parties narrow their issues and prepare for the next phase. The final phase of adjudication is usually conducted remotely through asynchronous communication channels. If an oral hearing is needed, it is conducted via telephone or video-conferencing.

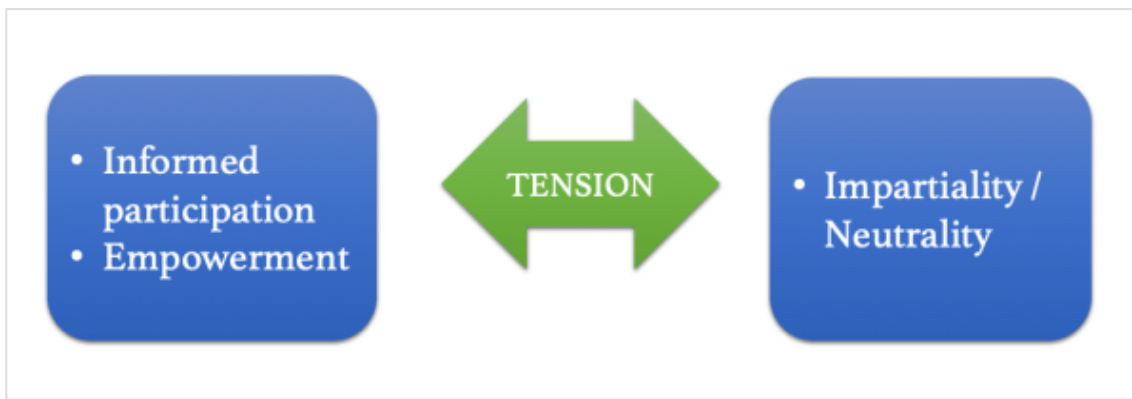
### **Why examine “old” ethics?**

These ODR systems offer unprecedented opportunities for the thoughtful and imaginative application of dispute system design principles to meet the goals of the courts, and, as noted by ODR commentator Rabinovich-Einy, generate legitimacy in court processes. It also means that the goals and core values underlying court dispute resolution should be clearly articulated and guide the design of these systems.

In this regard, my research looks back at the “old” ethical difficulties that used to confound the mediation community and the courts, and asks whether these challenges will resurface in the new ODR context. My conference presentation examined two “old” ethical difficulties concerning levelling the playing field between disputants; and whether the system should have distinct ADR processes. This post focuses on the first issue.

### **Levelling the playing field between disputants**

One distinctive characteristic of the highly successful court ODR systems is the provision of guided triage that empowers users to resolve the dispute. The Solution Explorer tool in the CRT uses guided pathways to help the disputant learn more about disputes, then to diagnose the problem in terms of the relevant legal rights and to provide self-help tools. The Utah system for small claims has placed even greater emphasis on education. Apart from providing customised self-help resources and legal services at the start of the process, this system also assigns a facilitator to the case once all the parties have joined the Web portal. One of the facilitators’ key functions is to provide limited legal advice and provide individualised education and assistance. When describing the system, Utah Supreme Court justice Deno Himonas [commented](#) that the relevant rules may have to be amended to allow the facilitator to give limited legal information even though he or she is not acting as counsel for either party.



This tension is not new to mediators. We often observe informational asymmetry amongst the disputants. One party may be a repeat player in the courts or may have received sophisticated legal advice. By contrast, the other party could be misinformed about his or her legal rights. As mediators, we are familiar with the struggle in deciding how much to intervene to help the disputants to make informed decisions. This dilemma is apposite in court-connected mediation, where it is arguably more important to uphold the perception of the court mediator's impartiality.

In the court ODR context, this dilemma could be more acute. The ODR system's value lies in its great potential in levelling the playing field between parties where there is information asymmetry. Notably, 94% of the parties resolved their dispute at CRT's Solution Explorer stage without requiring further intervention.

However, should the courts level the unequal playing field? There is the risk of the courts taking on a more active role than they have been accustomed to. On this point, Katherina Palmgren, in her [report exploring the use of ODR in Victoria](#) (p. 7), noted below the faint distinction between providing legal information and legal advice. The latter is, of course, deemed more objectionable, but the courts may inadvertently provide legal advice when giving customised problem diagnosis.

*One of the main concerns in relation to the online court is the provision of 'legal information' by the court to the court user during the exploration stage of the online process. This is a new and foreign concept to the courts which gives rise to the question: what is the distinction between 'legal information' and 'legal advice'? Is this a blurry line that ought not be walked by the courts? Some say yes, but many say no. Take for example registry staff, they walk this line every day and do not necessarily think it is a difficult one. Simply put, when you provide information that is general and factual in nature such as the applicable legal principles on a subject matter, that is legal information and educational in nature. When you provide information that is tailored to the particular facts of a case, that is legal advice. Common concerns raised in relation to the provision of legal information during the exploration stage are: what if the information provided at the exploration stage is incorrect? What if there is a loophole in the legislation that a lawyer could have advised on?*

limited court intervention in levelling the uneven playing field. When lawyers are allowed to participate in the ODR system, it is arguable that the parties expect an inherently unequal playing field owing to the differing levels of legal assistance. In such circumstances, the courts' efforts to level the playing field could be perceived as unwelcome interference. This issue has yet to arise in systems such as the CRT, where parties are not allowed to have legal representation. Nonetheless, as court ODR expands its scope, it is very likely to be used in more complex and higher value claims in which lawyers cannot realistically be excluded. The courts therefore need to discern when its proactive intervention through educating the parties will be perceived as compromising its even-handedness.

Looking ahead, it is not inconceivable for future court ODR systems to provide the disputants not only with legal information, but also assisted decision-making or negotiation tools. These tools could be used at the negotiation and facilitation stages to enable court users to understand the merits of their case more accurately, or to arrive at negotiated agreements that maximises value. These tools are currently available outside the court context. If incorporated into a court ODR system, they will empower disputants to make well-informed decisions. Again, there could be an impact on the courts' perceived impartiality. Will the suggestions of these tools be seen as being endorsed by the courts? What if a disputant takes issue with the input of these tools, arguing that he or she was misled to arrive at a settlement? Also, will the disputants be assured that the tools provided by the ODR system is giving equal assistance and support to each person?

### **Implications for Court ODR**

There are many practical implications arising from the above questions. To avoid the perception of partiality, the courts could take practical steps to dissociate themselves from the provider of the legal information. For instance, they could collaborate with external agencies so that the resources provided are not attributed to the courts. In this respect, Utah's system provides access to licensed paralegal practitioners that are not employed by the courts. During the pilot of the small claims project, the facilitators were volunteers who did not represent the courts or either of the parties. The perception of even-handedness could also have a discernible impact on the design of the online self-diagnosis tools. Although the system provides individualised and customised triage, it could simultaneously assure users that all parties in the dispute are provided with the same information and tools. The courts also have to carefully consider whether the ODR system should incorporate decision-making or negotiation support tools in the future.

### **The enduring relevance of ethical principles**

Dispute resolution is slowly but surely evolving in the private and court contexts, bringing about exciting possibilities by breaking down conventional boundaries between modes of dispute resolution, and introducing algorithmic support tools and information. This post seeks to encourage a deeper consideration of how dispute resolution ethical principles will remain relevant in a rapidly changing environment. Some of the "old" ethical conundrums have to be confronted in order to

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**About Dr Lola Akin Ojelabi**

Dr Akin Ojelabi is a Senior Lecturer in the School of Law, La Trobe University. Her research interests are in the fields of conflict resolution including alternative dispute resolution (ADR) and international law. Her ADR research focuses on issues of fairness and justice, in particular, access to justice for vulnerable/disadvantaged citizens, process design, and culture. In the field of international law, her interest is in the role of international institutions, particularly the United Nations, in the resolution of disputes and how international law principles promote peace and justice globally.

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